

STATE OF MICHIGAN  
IN THE SUPREME COURT

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BARUCH SLS, INC.,

Petitioner-Appellant,

v

TOWNSHIP OF TITTABAWASSEE,

Respondent-Appellee.

Supreme Court Docket No. 152047

Court of Appeals Docket No. 319953

Michigan Tax Tribunal  
Docket No. 0395010  
0415093

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**REPLY BRIEF BY PETITIONER-APPELLANT**

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## **LAW AND ARGUMENT**

### **I. THE COURT OF APPEALS ERRED IN DETERMINING THAT BARUCH FAILED TO MEET ITS BURDEN OF PROOF THAT IT DID NOT OFFER ITS CHARITY ON A NON-DISCRIMINATORY BASIS.**

Petitioner-Appellant Baruch SLS, Inc., respectfully submits that the Answer filed by Respondent-Appellant Township of Tittabawassee does not respond directly to the arguments raised by Baruch in its Application for Leave to Appeal. The Township does not acknowledge the fact that the opinion of the Court of Appeals rejects the reasoning and analysis of the Tax Tribunal, but rather, the Township suggests that the Court of Appeals simply affirmed the tribunal upon finding that “the Michigan Tax Tribunal’s findings were supported by competent, material, and substantial evidence on the record.” (Answer to Application, p 23). This suggestion is inaccurate, to say the least, as the Court of Appeals expressly rejected the Tax Tribunal’s “indictment of petitioner’s policy requiring 24 months of full payment before entry into the program” and the Tax Tribunal’s “faulting petitioner’s written policy of making only 25 percent of the rooms available.” (Majority Opinion, p 5, fn 1).

In addition and significantly, the Township does not challenge or contest the fact that Baruch administers its “income based” program with respect to applicants in precisely the same non-discriminatory fashion as Baruch administers the program with respect to existing residents. The Court of Appeals found the Baruch administered its “income based” program with respect to existing residents in a non-discriminatory fashion, and Baruch’s position before the Court of Appeals in seeking reconsideration and before this Honorable Supreme Court in seeking leave to appeal is that the Court of Appeals erred in its reading of the record when it determined that, “But to be eligible for the program, one must first be a resident.” (Majority Opinion, p 5). The undisputed truth of the matter is that one need not first be a resident in order to be eligible for the

program, as applicants are admitted directly into the “income based” program as residents under that program in the same manner as existing residents are admitted into the program.

Nor does the Township challenge or seek leave to cross-appeal the determination of the Court of Appeals that Baruch’s administration of the “income based” program is non-discriminatory with respect to existing residents. Instead, the Township identifies a number of facts in its Answer and argues that these facts justify the determination of the Tax Tribunal that Baruch’s charity was administered on a discriminatory bases. Baruch will respectfully respond to each of these “facts” identified by the Township.

The Township first points out at pages 18 to 19 of its Answer that Baruch requires residents to sign “validly binding contracts” and argues that, “Under Michigan law, a contract is not a gift for charitable purposes.” The Township does not acknowledge that Michigan law also requires adult foster care facilities such as Baruch to be licensed and that licensed facilities are required to utilize contracts known as resident care agreements. The regulations are extensive, and it is wholly unfair and improper to argue that licensing requirements provide a basis for disqualification as a charity. For example, the state regulations set forth the requirements of a resident care agreement, require that residents sign the agreement, and actually require that a form resident care agreement be utilized. The state regulations provide in pertinent part that:

(6) ***At the time of a resident's admission, a licensee shall complete a written resident care agreement.*** A resident care agreement is the document which is established between the resident or the resident's designated representative, the responsible agency, if applicable, and the licensee and which specifies the responsibilities of each party. A resident care agreement shall include all of the following:

(a) An agreement to provide care, supervision, and protection, and to assure transportation services to the resident as indicated in the resident's written assessment plan and health care appraisal.

- (b) A description of services to be provided and the fee for the service.
- (c) A description of additional costs in addition to the basic fee that is charged.
- (d) A description of the transportation services that are provided for the basic fee that is charged and the transportation services that are provided at an extra cost.
- (e) An agreement by the resident or the resident's designated representative or responsible agency to provide necessary intake information to the licensee, including health-related information at the time of admission.
- (f) An agreement by the resident or the resident's designated representative to provide a current health care appraisal as required by subrule (10) of this rule.
- (g) An agreement by the resident to follow the house rules that are provided to him or her.
- (h) An agreement by the licensee to respect and safeguard the resident's rights and to provide a written copy of these rights to the resident.
- (i) An agreement between the licensee and the resident or the resident's designated representative to follow the home's discharge policy and procedures.
- (j) A statement of the home's refund policy. The home's refund policy shall meet the requirements of R. 400.14315.
- (k) A description of how a resident's funds and valuables will be handled and how the incidental needs of the resident will be met.
- (l) A statement by the licensee that the home is licensed by the department to provide foster care to adults.
- (7) ***A department resident care agreement form shall be used unless prior authorization for a substitute form has been granted, in writing, by the department.*** A resident shall be provided the care and services as stated in the written resident care agreement.
- (8) ***A copy of the signed resident care agreement shall be provided to the resident or the resident's designated representative.*** A copy of the resident care agreement shall be maintained in the resident's record.

Mich Admin Code R 400.14301 (emphasis added).

The preceding quotation from the state regulations also places the Township's argument concerning the deposit and payment of monthly charges in their proper context. The Township argues at page 20 of its Answer that:

In the present case, the undisputed evidence showed that each applicant must enter into a resident care agreement with Baruch before being admitted as a resident to Stone Crest. This requires a \$750 non-refundable entrance fee. Monthly charges are due and owing in full each month and payable in advance.

Licensed adult foster care facilities like Baruch are required to utilize resident care agreements and to specify in those agreements items such as charges, deposits and fees. The \$750 non-refundable fee is, as Connie Clauson testified, fully refundable until the resident spends one night in the resident's room. (HT, p 150). Connie Clauson also testified regarding the requirement that monthly charges are payable in advance. She testified:

We explain to the resident and their families when they move in that they -- this becomes their home and they are renting a room and so it's like renting an apartment, you do have to pay in advance for that month. We don't put people on the hook for a lease, for a 12-month lease or 24-month lease, they are really renting a month at a time. So it's just simply explaining our payment arrangement with them.

(HT, p 97).

Significantly, neither the fee nor the monthly advance payment requirement has any bearing on the question presented, and the Township advances no argument why either of these "facts" is discriminatory.

At page 20 of its Answer, the Township also identifies the 24 month requirement, but neglects to mention that "accommodations were routinely made" as observed by the Court of Appeals which determined that the Tax Tribunal's "indictment" of this policy "holds no water." (Majority Opinion, p 5, fn 1).

Lastly, the Township asserts at page 20 of its Answer that:

Baruch has admitted, and it is undisputed, that Stone Crest has not admitted anyone to its facility who has not had the ability to pay. Stone Crest has never accepted any person who is not able to pay. Every resident at the facility is charged a fee, and no one at the facility is not charged. (TR 73-75).

It is equally undisputed that Stone Crest has never refused to admit anyone to its facility who has not had the ability to pay. Nor has Stone Crest ever refused to accept any person who is not able to pay. The reason for this state of affairs is that all who desire Baruch's charity have some ability to pay given the social security programs. In response to questioning by the Township's counsel, Connie Clauson testified:

Q And so also I've asked you a number of these questions in the interrogatories of R13, but again the -- you indicate that Baruch has not at this point ever accepted anyone or Stone Crest has not accepted in to be a resident who has not paid; is that correct, who has not been charged and paid?

A. The -- who has not been charged? The population that we serve has Social Security so we work the room rates based on what their income is because our population of seniors we serve do have some income, it's not like serving someone who doesn't qualify for anything, so to answer your question, we have charged everyone but there are times we only charge them what their income is.

(HT, p 148).

In response to follow-up questioning by Baruch's counsel, Ms. Clauson testified that the fact that the population whom Baruch seeks to serve has some income in the form of social security or social security disability benefits actually led to the development of the "income based" program, because Baruch could serve more people who need the charity.

A. Yeah. Because we're serving elderly or disabled individual[s] those folks have qualified for Social Security either through the disability program or the older American program, so they do have some income. When we were designing how we wanted to assist people that had outlived their assets and could no longer live in assisted living I looked at a couple different models and there's a model out



there you can just set your rates really low, so if the average rate is \$2,500 you set your rate at \$1,200 so you're helping a lot of people because it's \$1,200. However, it didn't address the fact that -- there could be people who had a lot of money and was just getting a good deal, but it didn't address the people who didn't make \$1,200, so even though the rate was low and the facility had to subsidize their operating budget another way, it still didn't take care of everyone who really didn't have money, so that didn't work for me because we wanted to be able to serve to truly the folks who couldn't afford to live in assisted living, so we went to an income-based program because then it addressed that they had Social Security, sometimes they can qualify to get SSI to go along with that, which gets us up to \$787.50 and then we could take care of almost everybody because we would base it on their income and not just at a low rate, so it was really important to us to be able to serve that whole population who didn't have the money to live other places. So that's why we went with an income-based program for our residents-assist program as to opposed to just a low rate.

The Township has never challenged this testimony nor presented legal argument or analysis that there are individuals in need of adult foster care services who do not qualify for social security either through the disability program or the older American program. Rather, the Township is content to simply argue that, since everyone pays something, there must be something discriminatory about the program. The unstated and unsupported inference is that there are persons in need of Baruch's charity who do not qualify for any social security benefit, and it is those unidentified individuals who must necessarily be being discriminated against. The fact of the matter is that they do not exist. Even individuals who never worked a day in their life are entitled to benefits under the Supplemental Security Income program. 20 CFR Ch. III Part 416.

The underlying purpose of the Supplemental Security Insurance (SSI) program is to assure all individuals a minimum level of income who are age 65 or over, or who are blind or disabled and who do not have sufficient income and resources to maintain a standard of living at the established Federal minimum income level. 20 CFR Section 416.110. It is a safety-net for the most vulnerable individuals, and it acts as a stop-gap from extreme poverty. The eligibility

requirements for an individual to qualify for Supplemental Security Income payments are found in 20 CFR 416.202 and are defined as an individual who is: (1) either 65 years of age or older, is blind or disabled; (2) a resident of the United States and is either a citizen, lawfully permitted permanent resident or qualified alien; and (3) does not have more in income or resources than permitted. There is no requirement that an individual applying for assistance under this program have ever worked or contributed payroll taxes as there is in the Social Security disability insurance program requirements however, the Supplemental Security Income program requires that an individual have less than the federally-specified amount of income and resources.

Such persons who qualify for the Supplemental Security Income are the very persons who need Baruch's charity and whom Baruch desires to serve.<sup>1</sup> The ability to maximize the number of such persons whom Baruch can serve is the very basis for the development of the "income based" program, and it is ironic to say the least, that the Township labels the "income based" program as discriminatory for failing to serve the purely hypothetical and non-existent individual who needs Baruch's charity but is not eligible for even Supplemental Security Income.

## **II. CONCLUSION AND RELIEF REQUESTED**

The Township has not responded directly to the arguments and points made in Baruch's Application for Leave to Appeal. The Township does not contest the fact that Baruch administers

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<sup>1</sup> It should be noted that "services" included in the facility rates include three meals per day with snacks, coffee and juices available at all times, dispensing medication and giving shots as per doctor's orders, bathing and assistance with personal hygiene, handicapped accommodations, complete housekeeping, planned activities, towels, wash cloths, and bed linens. See Respondent's exhibit R-6. Baruch charges individuals for these services based upon the individual's available income. Baruch could charge such individuals nothing for these services, thereby allowing the individual or the person managing the individual's money, to gift the money to relatives, save the money, or use the money in some other way. However, Baruch has elected to charge the individual so that Baruch can maximize its ability to serve other individuals who need Baruch's charity services.

its charity to applicants in precisely the same manner as it administers its charity to existing residents. Applicants and residents are admitted directly into the “income based” program on a first come first serve basis. Contrary to the Court of Appeals’ statement, one need not be a resident to be eligible for Baruch’s charity, and the record is replete with instances where applicants have been admitted directly into the program. The Court of Appeals determined that Baruch’s administration of its charity was non-discriminatory when applied to existing residents, and the same conclusion necessarily follows with respect to applicants who are treated in precisely the same manner as existing residents.

There is absolutely no evidence of any discrimination in this record, and there is no evidence that anyone has ever been denied admission to the program who did not have any ability to pay. The undisputed testimony is that all who need Baruch’s charity have some ability to pay given social security programs, and the Township does not argue otherwise. Instead, the Township simply points out that all residents pay something and leaves it to the reader, based purely upon the reader’s general assumptions, that some persons may be ineligible for social security and hence unable to pay anything. The general assumption is false, as even persons who never worked a day in their life are eligible to receive Supplemental Security Income (SSI). The fact that all residents pay something is proof that all who need Baruch’s charity have some ability to pay, not that Baruch is discrimination against persons who have no ability to pay. The “income based” program was developed precisely because all who need Baruch’s charity have some ability to pay, and Baruch charges those individuals something based upon their ability to pay so that Baruch can maximize the number of persons to whom it can provide its charity.

Petitioner-Appellant Baruch SLS, Inc., respectfully requests that this Honorable Supreme Court enter an order reversing both the April 21, 2015 judgment of the Court of Appeals and the

December 20, 2013 Final Opinion and Judgment of the Michigan Tax Tribunal and remanding this matter to the Tax Tribunal for entry of judgment in favor of petitioner and granting petitioner an exemption from *ad valorem* real and personal property taxes under MCL 211.7o and MCL 211.9 for the 2010, 2011, and 2012 tax years. Alternatively, Baruch respectfully requests an order remanding this matter for consideration of Baruch's motion for reconsideration.

Respectfully submitted,

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Dated: September 2, 2015

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